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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. [redacted] 49

PACIFIC STEAMSHIP COMPANY, PETITIONER,

vs.

CARL G. PETERSON.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BENJAMIN S. GROSSCUP,
W. CARR MORROW,
J. C. DAVIES,
Counsel for Petitioner.

(33,159)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 707

PACIFIC STEAMSHIP COMPANY, A CORPORATION, PETITIONER,

vs.

CARL G. PETERSON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Comes now Pacific Steamship Company, a corporation, and in support of this, its application for a writ of certiorari to be directed to the Supreme Court of the State of Washington, respectfully shows and alleges:

That petitioner is engaged in the transportation of freight and passengers by water between ports on Puget Sound and ports of the State of California. That in the month of December, 1924, it was the owner

of the steamship *Admiral Dewey*, and was engaged in operating the said steamship in said commerce. That on or about the 18th day of December, 1924, the said steamship *Admiral Dewey* sailed from the port of Seattle for the port of San Francisco. That said vessel was loaded with freight and passengers.

That the respondent was in the employ of the petitioner on said vessel in the capacity of a boatswain. That on or about the 20th day of December, 1924, while the said vessel was pursuing its usual course in a southerly direction along the Pacific Coast it ran into a gale and shipped some water over its deck, which caused a cargo of boxed clams and oysters stowed upon the aft port deck to become more or less awash. The mate upon said vessel observed this cargo awash, and believing it to be necessary or advisable for the safety of the passengers, crew and ship to secure the same, ordered the respondent to take his crew and lash the same. This the respondent undertook to do, and while so engaged a heavy sea came over the stern of the ship, struck respondent, knocked him down, washed a box of clams against him and injured his left knee.

About two days thereafter the vessel reached the port of San Francisco, and the respondent, at his request, was immediately taken to the Marine Hospital at said port by petitioner for maintenance and cure.

Respondent was provided with maintenance and cure for said injury by petitioner at said hospital until April 3, 1926, at which time he voluntarily left the same. That while respondent was at said hospital he demanded and received his wages to the end of the voy

age on which he was injured, which constituted about two weeks' pay, amounting to the sum of $41.10.

That on or about June 3, 1926, respondent instituted the present action against petitioner by filing his complaint in the Superior Court of the State of Washington for King County. Paragraph II of said complaint reads as follows:

> "That the plaintiff prosecutes this action under and by the terms and provisions of Section 20 of the Act of Congress of March 4, 1915, as amended by Section 33 of theAct of June 5th, known as the 'Jones Act'" (R., 1).

Respondent charged negligence of a fellow servant. The charging part of his complaint is found in Paragraph V and is as follows:

> "That, nevertheless, the mate negligently ordered the plaintiff to lash the said cargo, and the said officer in command of the said vessel negligently and carelessly failed and omitted to have the vessel hove to or slowed down, during the said work, to prevent the sea breaking over the decks, and carelessly and negligently failed to install and provide a life line on the after port quarter" (R., 2).

No contention was made by respondent in his complaint that his injuries were due to the unseaworthiness of the vessel or defective equipment.

Petitioner filed its answer to said complaint (R., 3), which answer consists of general and special denials, affirmative allegations and an affirmative defense.

The petitioner's answer to Paragraph II of respondent's complaint, above quoted, is as follows:

> "Denies each and every allegation and all allegations contained in Paragraph II of plaintiff's complaint, and in this connection alleges that long prior to the commencement of plaintiff's action set out in his said complaint, the plaintiff elected to receive wages to the end of the voyage, and maintenance and cure for any injuries which he received on said voyage; and the plaintiff has received his wages to the end of the voyage and has received maintenance and cure for any injury received, and received the same prior to the filing of his said complaint herein, and he cannot now maintain an action under the Jones Act, or any other action, for damages for any injuries received upon the voyage set out in his complaint" (R., 4).

Petitioner also set up an affirmative defense to respondent's complaint, Paragraph III of which reads as follows:

> "That while the said S. S. *Admiral Dewey* was on a voyage between the ports of Puget Sound and ports of California, it had laden on board a cargo of boxed clams and oysters lashed on the after port deck. That on or about the 28th day of December, 1924, while on said voyage, the said vessel encountered a heavy sea, which caused the said cargo to be and become awash. That the plaintiff attempted to lash the said cargo, and while so engaged, a sea broke over the aft port deck of said vessel and caused a box of said cargo to strike plaintiff,

and injured his left knee. That immediately thereafter plaintiff's leg was placed in splints by the mate, and as soon as said vessel arrived at the port of San Francisco, California, plaintiff was by the defendant removed from said steamship and conveyed to the Marine Hospital at San Francisco, for maintenance and cure. That plaintiff has received from the defendant at said hospital maintenance and cure as far as medical and surgical attention can reasonably effect a cure. That the plaintiff received his wages from the defendant to the end of the voyage, including a bonus totaling the sum of $41.10, prior to the commencement of this suit. That the plaintiff, in accepting said wages to the end of the voyage and permitting defendant to take him to said Marine Hospital at San Francisco, California, and in consenting to go thereto for maintenance and cure for the injuries he received, elected to take compensation for said injury under the general admiralty and maritime law in such cases made and provided, and he has been fully and completely compensated by defendant for said injuries under the said general admiralty and maritime law, and the plaintiff made said election to accept compensation and received the same under the general admiralty and maritime law long prior to the filing of this suit, and the plaintiff cannot now elect to sue or maintain this action for damages under Section 20 of the Act of Congress of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920, known as the 'Jones Act' " (R., 6 and 7).

Petitioner prayed in its answer for judgment dismissing the plaintiff's cause of action. The respondent thereafter filed a motion to strike from petitioner's answer the affirmative allegations set up in its answer to said Paragraph II of respondent's complaint (R., 7). The respondent also filed a demurrer to the affirmative defense contained in petitioner's answer on the ground that the facts set out in the affirmative defense did not constitute a defense to respondent's action (R., 8). The motion and demurrer came on for hearing before the trial court. The motion to strike was granted, and the demurrer was sustained (R., 8). The court allowed the petitioner to file an amended answer. This the petitioner did (R., 9), and in its amended answer set up more in detail the affirmative defense contained in its original answer above quoted, and added thereto the following allegation:

> "That at the beginning of said voyage and at all times during the continuation of the same the said steamship *Admiral Dewey* was properly equipped, manned, victualled and in all respects seaworthy" (R., 12).

Respondent moved to strike from the files petitioner's said amended answer (R., 13), which was granted by the court (R., 14). The trial court by its ruling above specified held that where a seaman has received a personal injury in the course of his employment and has demanded and received maintenance and cure for said injuries as far as medical and surgical skill can effect a cure, and has demanded and received wages to

the end of the voyage on which he was engaged at the time of the injury does not thereby elect to receive compensation for his injuries under the general admiralty or maritime law and is not estopped thereby from thereafter recovering full common law damages for the same injuries under Section 33 of the Merchant Marine Act, sometimes called the Jones Act.

It is this holding of the trial court, affirmed by the Supreme Court of the State of Washington, of which the petitioner complains.

This action came regularly on for trial before the trial court on the respondent's complaint and the special and general denials contained in petitioner's original answer. During the trial, and before judgment, the same question of law was raised in various ways, and the same ruling was made by the trial court. As a result of the trial, a judgment was entered in favor of the respondent and against the petitioner by the trial court in the sum of $12,500 and costs of suit (R., 30).

Petitioner thereafter appealed from said judgment of the trial court to the Supreme Court of the State of Washington (R., 31), and filed its supersedeas and cost bond on said appeal in the sum of $25,500 (R., 32). The petitioner in its assignment of errors in the Supreme Court specified and complained against the ruling of the trial court above set forth (R., 32-34).

This cause was heard before Department 2 of the Supreme Court of the State of Washington, and the court by its decision rendered November 3, 1927 (R., 34), held that the rulings of the trial court above specified were not error, and affirmed the judgment.

Peterson v. Pacific S. S. Co., 261 Pac. Rep., 115.

In due course the petitioner filed in said court its petition for rehearing before the full court (R., 47), which petition was denied by the court on December 7, 1927 (R., 54).

The judgment in favor of the respondent and against the petitioner has become final in so far as any relief can be secured by petitioner in the courts of the State of Washington. An order has been made and entered by the Supreme Court of the State of Washington staying proceedings on said judgment, pending the petition to this Court for a writ of certiorari (R., 55).

Reasons Relied on for Allowance of the Writ.

It clearly appears from the above summary of the facts and the matter involved in this case that the respondent contended in the courts of the State of Washington that a seaman who received a personal injury in the course of his employment has the right of election and must elect whether he will take compensation for the injuries under the general admiralty and maritime law, called by this Court the old rules, or seek compensation for his injuries under Section 33 of the Merchant Marine Act, designated by this Court as the new rules. It also clearly appears that the Supreme Court of the State of Washington in its final judgment in this cause held that a seaman for injuries received in the course of his employment, after demanding and receiving wages, maintenance and cure for the injuries, which in this case constituted full and complete compensation under the old rules, may sue and recover full

and complete common-law damages for the same injury under the new rules.

Whether an injured seaman must elect to receive compensation under the old rules or under the new, or whether he can recover full compensation under both, is a question of great importance and one which affects materially the welfare of the American Merchant Marine, as well as American seamen throughout the length and breadth of this country. It is a question which has not been directly decided by this Court, and is one of such importance and so substantially affects the welfare of the shipping interests of this country, which the United States Government, as well as private capital, is making heroic efforts to advance, that petitioner respectfully submits this Court should early decide.

A decision of this question involves an interpretation of Section 33 of the Merchant Marine Act, particularly the words "at his election," found therein, and, while this Court has not definitely decided this question, it has construed that act on several occasions and in its decisions construing the act has clearly laid down certain rules and principles which petitioner believes necessarily points to a different conclusion than that reached by the Supreme Court of the State of Washington, as will more fully appear in the accompanying brief.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of the State of Washington, commanding said court to certify

and send to this Court on a date certain to be therein designated, a transcript of the record of the proceedings in said Supreme Court of the State of Washington in said cause therein entitled "Carl G. Peterson, respondent, v. Pacific Steamship Company, a corporation, appellant," and numbered 20749, to the end that said cause may be reviewed and determined by this Court, as provided by the provisions of Section 237B of the Judicial Code, as amended by the Act of Congress of February 13, 1925, and that this petitioner may have such other and further relief in the premises as to this Court may seem appropriate, and that the judgment of the said Supreme Court of the State of Washington in this cause and every part thereof be reversed and set aside by this Honorable Court.

Respectfully submitted,

BENJAMIN S. GROSSCUP,
W. CARR MORROW,
J. O. DAVIES,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 707

PACIFIC STEAMSHIP COMPANY, PETITIONER,

vs.

CARL G. PETERSON.

SUPPORTING BRIEF.

Statement.

There is but one question of law which the petitioner seeks to have reviewed by this Court; that question is: Can a seaman who has received a personal injury in the course of his employment, after having demanded and received from his employer maintenance and cure for the injury received and wages to the end of the voyage, thereafter maintain an action under Section 33 of the Merchant Marine Act and recover full common-law damages for the same injury?

Jurisdiction.

The answer to this question requires an interpretation and construction of Section 33 of the Merchant

Marine Act, 41 Stat., 1007, and particularly the words, "at his election" found therein.

The material part of said section reads as follows:

> "That any seaman who shall suffer personal injury in the course of his employment may *at his election* maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

If the words "at his election" mean election between the old rules and the new, as contended by respondent, the decision of the Supreme Court of the State of Washington holding that the injured seaman may recover compensation under both the old and the new rules deprive the petitioner of valuable and substantial rights under the said statute, and this Court clearly has jurisdiction to review by certiorari the final judgment of that court under Section 237-B of the Judicial Code, as amended by Act of Congress on February 13, 1925.

Argument and Authorities.

The contention of the petitioner in the Supreme Court of the State of Washington was and now is that, under the law as it now exists and existed at the time of respondent's injury, a seaman for personal injury received has two separate and distinct systems of law measuring the relief which he may demand of his employer—the allowances provided by the general maritime law, the old rules, or common-law damages under

Section 33 of the Merchant Marine Act, the new rules, that the seaman must elect under which he will seek his compensation and cannot have both, or part of one and part of the other.

The law governing the relation between a seaman and a ship and its owner, under the old rules, after a most careful historical research, was summarized by this Court in the case of

The Osceola, 189 U. S., 158,

as follows:

> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> "2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. (Scarff *v.* Metcalf, 107 N. Y., 211.)
>
> "3. That all members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
>
> "4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to

> maintenance and cure, whether the injuries were received by negligence or accident."

Petitioner alleged in his answer that the respondent prior to the bringing of this action had demanded and received wages, maintenance and cure for his injuries, and that the ship was seaworthy at the time. These allegations were found to be true by the Supreme Court in its opinion. Respondent, therefore, prior to the bringing of this action, received full compensation for his injuries under the law announced in the above case.

These rules were in full force and effect and governed the relation of seaman to the ship and his employer at the time the Congress enacted the above-quoted statute.

The question is: What was the intention of Congress in the enactment of that statute? Did Congress intend to abolish the law as laid down in that case? Or did Congress intend to change or modify the law therein announced? And if so, in what particular? Or did Congress intend to supplement and add to those rules further and additional liability? Or did Congress intend to allow the rules laid down in that case to stand unchanged and unmodified and merely add thereto new rules and new rights which a seaman might have, with the right to elect between the two?

The answer to these questions depends almost wholly upon the correct interpretation of the words "at his election" found in the statute.

The words "at his election" are in frequent use and their meaning has been frequently defined by the courts, so frequently that there now can be no dispute

as to their meaning. It certainly must be presumed that Congress knew the meaning of those words when it passed the statute and intended to give them their well-defined meaning and effect. Generally speaking, the words in substance and fact mean that a person who has a right of election must choose between one of two things—that he cannot have both, nor a part of one and a part of the other.

3 Words and Phrases, pp. 2336-2337.

The Supreme Court of the State of Washington, by its decision, held that the fact that the respondent had demanded and received his wages, maintenance and cure for the injury, together with the fact that the injury was not due to any unseaworthiness of the vessel, did not constitute an election to take under the old rules and constituted no bar to the present action to recover full common-law damages for the same injury under the new rules.

Under the decision of the Supreme Court of the State of Washington, the statute now reads as follows:

> "That any seaman who has suffered personal injury in the course of his employment may, after having received full compensation for such injury under the general maritime law as it now exists, maintain an action for damages at law, with the right of trial by jury, etc."

The petitioner respectfully requests this Court to determine whether or not the Supreme Court of the State of Washington was right in eliminating from the statute the words "at his election" found therein, and

substituting in place thereof the following words: "after having received full compensation for such injury under the general maritime law as it now exists."

While this Court has not passed directly upon this question, we believe that the conclusions reached by the Supreme Court of the State of Washington are contrary to both the word and spirit of the decision of this Court construing this same statute.

In the case of

Panama Railway v. Johnson (264 U. S., 375),

this Court, in construing this statute, said:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and *extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules.* The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

Again, in the same decision, the Court said:

> "A further objection urged against the statute is that it conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbi-

> trary. The complaint is not directed against either measure of redress or either form of action, but only against the right of election as given. Of course the objection must fail. There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it has never been held, nor thought so far as we have been advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought."

In the case of

> Engel v. Davenport, 271 U. S., 33,

this Court, in deciding the question whether the plaintiff had elected to bring his action under the old rules or the new, after quoting with approval the language of this Court in the case of Panama Railway v. Johnson, said:

> "1. The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnify for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act, Carlisle Packing Co. v. Sandanger, 259 U. S., 255; and we need not determine whether if it had

> been thus brought under the old rules, the State statute of limitations would have been applicable. See Western Fuel Co. v. Garcia, 257 U. S., 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that act, in which the petitioner, *instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules* in an action at law based upon negligence, in which he not only assumes the burden of proving negligence, but also, under Section 3 of Employers' Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. This conclusion is in harmony with the Panama Railroad case, pp. 382, 383, in which the complaint charged that the injuries resulted from negligence in providing a defective appliance and in other respects."

This Court, in the very recent case of Baltimore S. S. Co. v. Phillips, 47 Supreme Court Reporter, 600, held it was error for a trial court to allow a seaman maintenance and cure in an action based upon negligence, that is, an action brought under the new rules.

The petitioner respectfully submits that this Court in the above-cited case has firmly established the following propositions in law:

1. That the maritime law as it now exists affords to an injured seaman two separate and distinct grounds for relief or causes of action; one, to recover the allow-

ances provided by the old rules; the other, to recover damages provided by the new.

2. That he may pursue either at his election.

3. That he must elect under which he will take.

4. That he cannot recover under both, or part of one and part of the other.

The inferior Federal courts, so far as petitioner has been able to ascertain, have uniformly held that Congress, by the enactment of Section 33 of the Merchant Marine Act did not change, modify or repeal in any way the old rules as laid down by this Court in the case of *The Osceola;* that Congress merely brought into maritime law new rules, and that an injured seaman might elect and *must* elect under which he will seek compensation for his injury, and that he could not have both, or part of one and part of the other; that the seaman's rights under the old rules and the new were separate and distinct and could not be commingled.

Kuhlman *v.* W. A. Fletcher Co., 20 Fed. (2d), 465.

Lorange *v.* Alaska S. S. Co., 298 Fed., 547.

Wagstaff *v.* U. S., 281 Fed., 877.

Hughes *v.* Alaska S. S. Co., 287 Fed., 427.

Phillips *v.* Baltimore S. S. Co., 295 Fed., 323.

Rosinski *v.* Conners, 21 Fed. (2d), 591.

In the case of Kuhlman *v.* W. A. Fletcher Co., *supra*, plaintiff brought an action on the common-law side of the Federal district court, based upon negligence; he

afterwards sought by motion and amendment to the complaint to transfer his action to the Admiralty side of the court and to recover for injuries under the old rules. The trial court refused to allow the amendment to the complaint and refused to transfer the case from the common-law side of the court to the Admiralty side. After judgment, the plaintiff appealed to the Circuit Court of Appeals for the Third Circuit and alleged error on the part of the trial court in its said ruling. The circuit court of appeals, in deciding this question, was required to interpret Section 33 of the Merchant Marine Act, and in construing this section said:

> "This section broadened the maritime law by giving a seaman a new right—a right at law—through proceedings *in personam*, according to the course of the common law, on the common-law side of Federal district courts. State courts also have like jurisdiction. Engel v. Davenport, 271 U. S., 33; 46 S. Ct., 410; 70 L. Ed., 813. By so doing the Congress did not abrogate his old action in Admiralty, but gave him an entirely new action and allowed him a clear option to assert his old action in Admiralty on the Admiralty side of the district court with trial to the court or to assert his new action, based on negligence, on the law side with right of trial by jury. Panama R. R. v. Johnson, 264 U. S., 375; 44 S. Ct., 391; 68 L. Ed., 748; Engel v. Davenport, 271 U. S., 33, 36, 46; S. Ct., 410; 70 L. Ed., 813. If he elect the latter, he foregoes the advantages which the Government extends to seamen as its wards and places himself in the same relation to his employer as a railway employee engaged in interstate commerce bears to his em-

> ployer, with different yet certain advantages and certain disadvantages. Engel *v.* Davenport, 271 U. S., 33, 36, 46; S. Ct., 410; 70 L. Ed., 813. These old and new rights may not be commingled, but must be asserted separately in the forum which has jurisdiction of them respectively. The West Jester (D. C.), 281 F., 877, 878."

The injured seaman has no right to wages, maintenance and cure except under the provisions of Paragraphs 1 and 4 of the old rules, as announced in *The Osceola* case, and unless his injury was due to the unseaworthiness of the vessel, the receipt of wages, maintenance and cure constituted full and complete compensation for the injuries.

Under Paragraphs 1 and 4, if the old rules are still in force, the respondent has received full compensation for his injuries under the old rules, and if the respondent was required to elect between the old rules and the new, he cannot, after having received full compensation under the old rules, maintain an action under the new. Allowing respondent to do that would give the respondent relief under both, compel petitioner to pay double compensation for the same injury and thus render this statute unconstitutional.

It seems to petitioner that the decision of the Supreme Court of the State of Washington, holding that the respondent might recover under both the old and the new rules, is contrary to both the letter and the spirit of the statute, as well as the decisions of this Court.

Whether the decision of the Supreme Court of the State of Washington is correct or incorrect, we respectfully submit that the question is of such general importance to the welfare of the American Merchant Marine that the question ought to be decided by this Court.

It seems quite clear and obvious that the Federal district and circuit court of appeals have decided this question contrary to the decision of the Supreme Court of the State of Washington, and that the said Federal courts will not, out of deference to the Supreme Court of the State of Washington, change their views or conclusions which they had previously reached concerning the interpretation of a Federal statute, and unless this Court takes jurisdiction and decides this question, there will be one rule of law in the Federal courts and another in the State courts, and the maritime law will not have that uniform application throughout this country contemplated by the Constitution.

We respectfully submit that the petition for a writ of certiorari should be granted.

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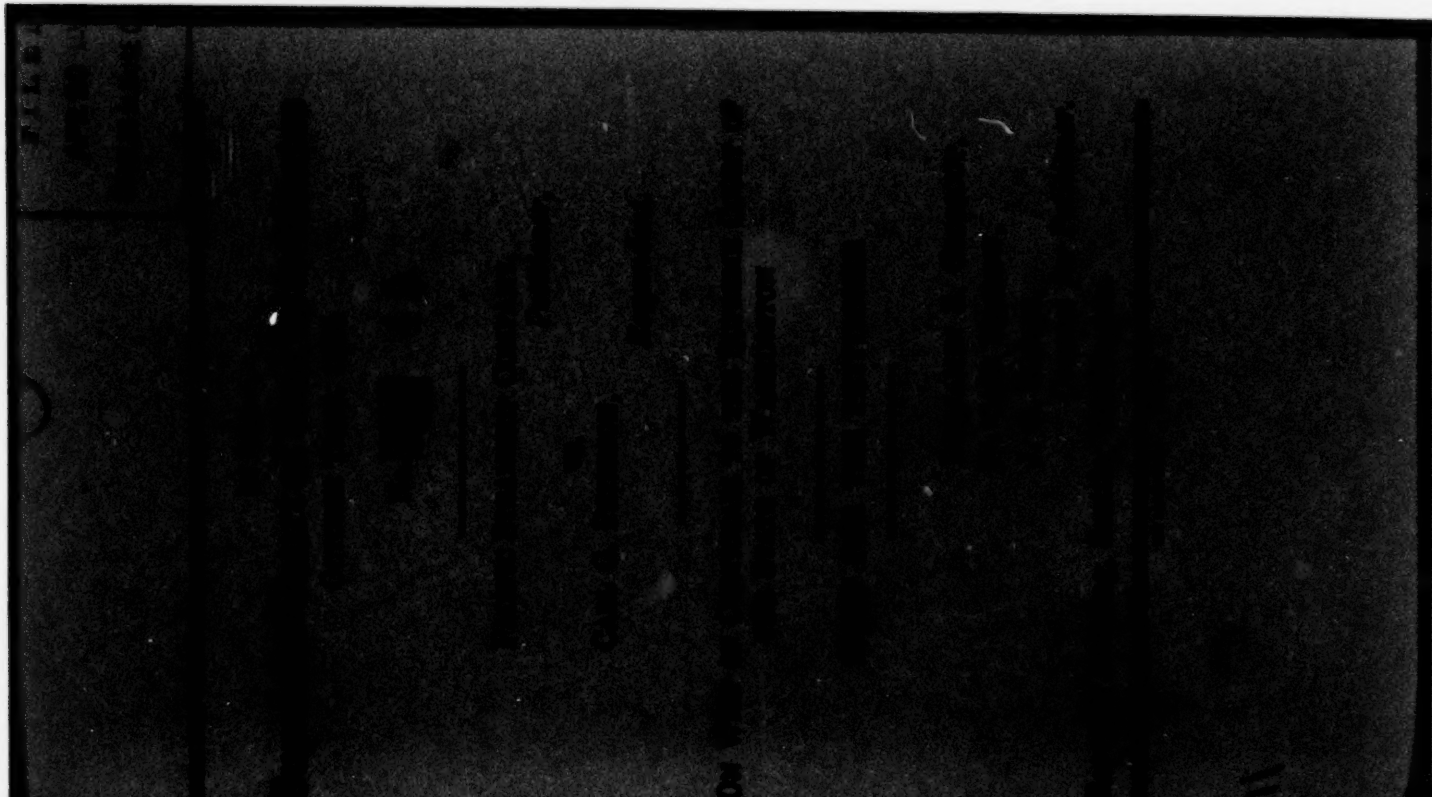

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

No. 707

PACIFIC STEAMSHIP COMPANY,
Petitioner,

vs.

CARL G. PETERSON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

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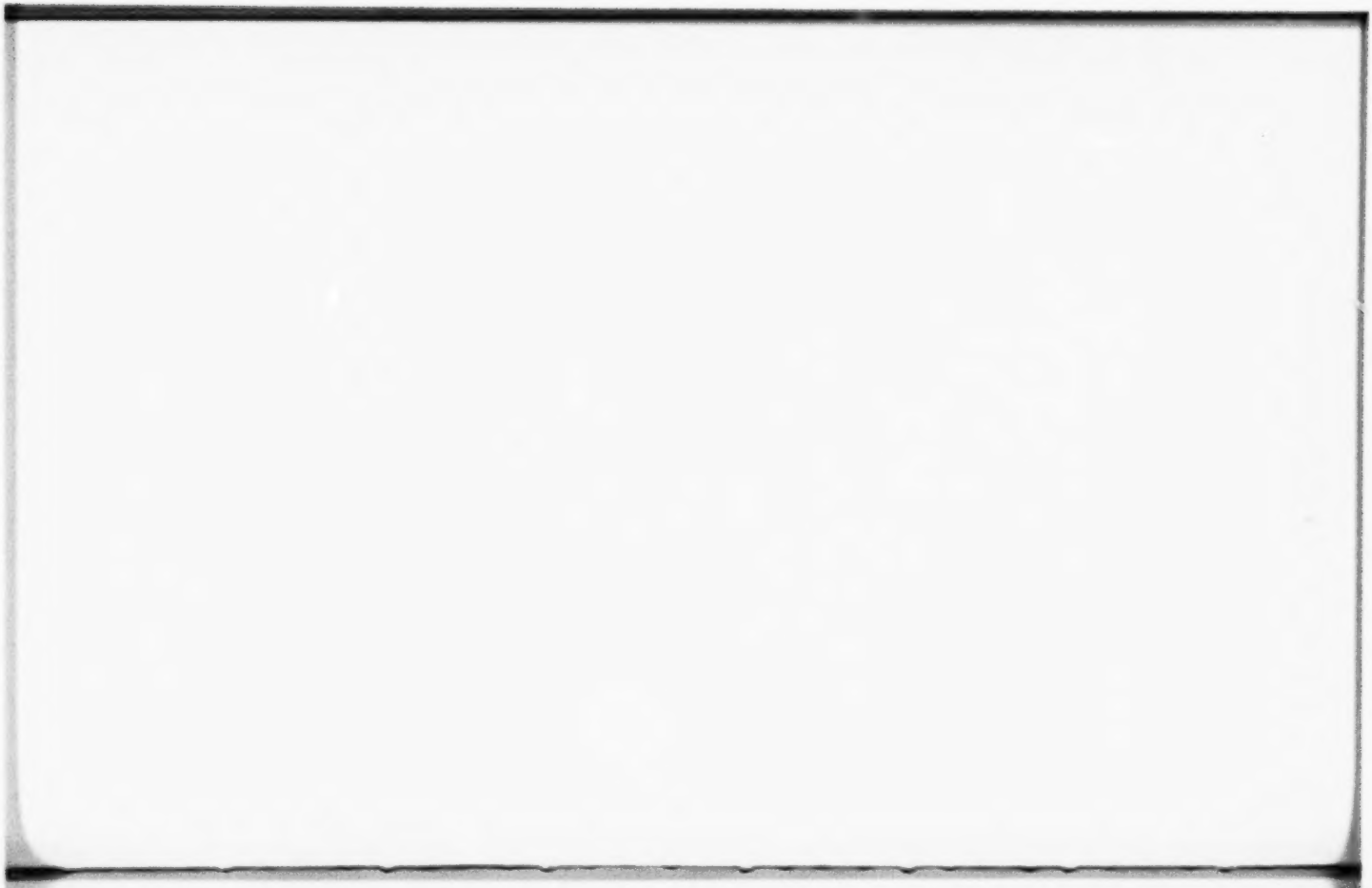

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

PACIFIC STEAMSHIP COMPANY,
Petitioner,

vs.

CARL G. PETERSON,
Respondent.

No. 707

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

OPINION

The opinion of the Supreme Court of the State of Washington (R. 34) is reported in 261 Pac. Rep. 115.

JURISDICTION

The opinion of the Supreme Court of the State of Washington was rendered on November 3, 1927 (R. 34). The petition for rehearing was overruled on December 8, 1927 (R. 54). Final judgment in the Supreme Court of the State of Washington was rendered on December 8, 1927 (R. 55). Order stay-

ing proceedings on judgment pending petition for certiorari was entered on December 8, 1927 (R. 55). The petition for writ of certiorari was filed in this court on January 18, 1928, and was granted by this court on March 5, 1928.

SPECIFIC CLAIM ADVANCED

Respondent brought this action under Sec. 33 of the Merchant Marine Act 41 Stat. 1007, now Sec. 688 Title 46 U. S. C. (R. 1). Petitioner by way of affirmative allegations and affirmative defenses (R. 4, Par. 2, R. 6 Par. 3, R. 12 Par. 3) alleged that the respondent, prior to the bringing of the present action had demanded of the petitioner and received maintenance and cure for his injuries and wages to the end of the voyage on which he was injured and that he had elected prior to the bringing of his action to receive compensation for his injuries under the general maritime law and had received the same, and that after receiving the same he could not maintain an action under said Section 33 of the Merchant Marine Act.

The Supreme Court of the State of Washington held that respondent's affirmative allegations and affirmative defenses did not constitute an election to take under the general admiralty or maritime law and constituted no bar to respondent's action for common law damages under said Section 33 of the Merchant Marine Act.

Determination of this question requires an interp-

retation and construction of said Section 33 of the Merchant Marine Act and particularly the words "at his election" found therein, and gives this Court jurisdiction to review the judgment of the Supreme Court of the State of Washington by certiorari under Section 237 B of the Judicial Code as amended by act of Congress February 13, 1925, now Section 344 B. Title 28 U. S. C.

STATEMENT OF THE CASE

The respondent commenced this action on June 3, 1926, in the Superior Court of King County, Washington. He seeks to recover damages for personal injuries received during the course of his employment with petitioner as a seaman. He brought his action under Section 33 of the Merchant Marine Act (R. 1). Paragraph II of his complaint (R. 1) reads as follows:

> "That the plaintiff prosecutes this action under and by the terms and provisions of Section 20 of the Act of Congress of March 4, 1915, as amended by section 33 of the Act of June 5, 1920, known as the 'Jones Act'."

His action is based upon the negligence of a fellow servant. The charging part of his complaint found in Paragraph V (R. 2) reads as follows:

> "That nevertheless the mate negligently ordered the plaintiff to lash the said cargo and the said officer in command of the said vessel negli-

gently and carelessly failed and omitted to have the vessel hove to or slowed down, during the said work, to prevent the sea breaking over the decks and carelessly and negligently failed to install and provide a life line on the after port quarter."

No contention or claim is made by respondent in his complaint, or otherwise, that his injuries were due in any way to the unseaworthiness of the vessel or defective equipment.

Petitioner filed its answer to said complaint (R. 3) which answer consists of general and special denials, affirmative allegations and affirmative defenses. Petitioner's answer to Paragraph II of respondent's complaint above quoted, is as follows:

"Denies each and every allegation, and all allegations contained in Paragraph II of plaintiff's complaint, and in this connection alleges that long prior to the commencement of plaintiff's action set out in his said complaint, the plaintiff elected to receive wages to the end of the voyage, and maintenance and cure for any injuries which he received on said voyage; and the plaintiff has received his wages to the end of the voyage and has received maintenance and cure for any injury received, and received the same prior to the filing of his said complaint herein, and he cannot now maintain an action under the Jones Act, or any other act, for damages for any injuries received upon the voyage set out in his complaint." (R. 4)

Petitioner also set up an affirmative defense to re-

spondent's complaint, Paragraph III of which (R. 6 and 7) reads as follows:

> "That while the said S. S. "Admiral Dewey" was on a voyage between the ports of Puget Sound and ports of California, it had laden on board a cargo of boxed clams and oysters lashed on the after port deck. That on or about the 20th day of December, 1924, while on said voyage, the said vessel encountered a heavy sea which caused the said cargo to be and become awash. That the plaintiff attempted to lash the said cargo, and while so engaged a sea broke over the aft port deck of said vessel and caused a box of said cargo to strike plaintiff, and injured his left knee. That immediately thereafter plaintiff's leg was placed in splints by the mate and as soon as said vessel arrived at the Port of San Francisco, California, plaintiff was by the defendant removed from said steamship and conveyed to the Marine Hospital at San Francisco, for maintenance and cure. That plaintiff has received from the defendant at said hospital maintenance and cure as far as medical and surgical attention can reasonably effect a cure. That the plaintiff received his wages from the defendant to the end of the voyage, including a bonus totaling the sum of $41.10, prior to the commencement of this suit. That the plaintiff in accepting said wages to the end of the voyage and in permitting defendant to take him to said Marine Hospital at San Francisco, California, and in consenting to go thereto

for maintenance and cure for the injuries he received, elected to take compensation for said injury under the general admiralty and maritime law in such cases made and provided, and he has been fully and completely compensated by defendant for said injuries under the said general admiralty and maritime law, and the plaintiff made said election to accept compensation and received the same under the general admiralty and maritime law long prior to the filing of this suit and the plaintiff cannot now elect to sue or maintain this action, for damages under section 20 of the act of Congress of March 4, 1915, as amended by section 33 of the Act of June 5th, 1920, known as the Jones Act."

Petitioner prayed in its answer for judgment dismissing plaintiff's cause of action. Respondent thereafter filed a motion to strike all of petitioner's affirmative allegations to Paragraph II of respondent's complaint (R. 7) and also filed a demurrer to the affirmative defense in petitioner's answer on the ground that the facts set out therein did not constitute a defense to respondent's action (R. 8). The motion to strike was granted, and the demurrer was sustained (R. 8). Petitioner thereupon filed an amended answer setting forth in greater detail the affirmative defense contained in its original answer above quoted and adding thereto the following allegation:

"That at the beginning of said voyage and at all times during the continuation of the same the said steamship 'Admiral Dewey' was properly equipped, manned, victualled and in all respects seaworthy." (R. 12)

Respondent moved to strike from the files the petitioner's said amended answer (R. 13) which motion was granted by the court (R. 14).

The trial court by its rulings above specified held that where a seaman has received personal injury in the course of his employment and has demanded and received maintenance and cure for said injuries, as far as medical and surgical skill can effect a cure, and has demanded and received wages to the end of the voyage on which he was engaged at the time of his injury, he does not thereby elect to receive compensation for his injuries under general admiralty or maritime law and is not estopped thereby from thereafter maintaining an action for the same injuries under Section 33 of the Merchant Marine Act and recovering full common law damages for the same.

This action came regularly on for trial on the respondent's complaint and the special and general denials contained in petitioner's original answer. As a result of the trial, a judgment was entered in favor of respondent and against petitioner by the trial court in the sum of $12,500 and costs of suit (R. 30).

Petitioner thereafter appealed from said judgment to the Supreme Court of the State of Washington (R. 31), and filed its supersedeas and cost bond on said appeal in the sum of $25,500 (R. 32). The petitioner in its assignment of errors in the Supreme Court specified and complained against the ruling of the trial court above set forth (R. 32).

This cause was heard before Department 2 of the Supreme Court of the State of Washington, which

court rendered its decision November 3, 1927, holding that the rulings of the trial court above specified were not error, and affirming the judgment (R. 34). In due course the Petitioner filed in said court its petition for rehearing before the full court (R. 47), which petition was denied on December 8, 1927 (R. 54). Final judgment of the Supreme Court of the State of Washington in this cause affirming the judgment of the court below was entered on December 8, 1927 (R. 55). On December 8th, 1927, an order was entered by the Supreme Court of the State of Washington staying proceedings on the judgment pending petition to this court for writ of certiorari (R. 55). Certiorari was granted by this Court on March 5, 1928.

SPECIFICATIONS OF ERROR TO BE URGED

The courts below erred in failing to sustain the petitioner's plea of election and satisfaction and in holding that a seaman who has received an injury in the course of his employment and has demanded and received maintenance and cure for his said injuries and wages to the end of the voyage on which he was injured, does not thereby elect to seek compensation under the general maritime law and is not estopped from thereafter suing for and recovering full common law damages for the same injury.

SUMMARY OF ARGUMENT

It was not the intention of the Congress of the United States in the enactment of Section 33 of the Merchant Marine Act to abolish, change or modify the general admiralty or maritime law governing the relation of a seaman to his ship and his employer, as developed by the admiralty courts and called by this Court, the old rules. It was clearly the intention of congress in the enactment of said Section 33 of the Merchant Marine Act to bring into the maritime law, new rules drawn from a different system. By the enactment of that section congress picked up bodily the common law as modified by the Federal Employer's Liability Act and incorporated the same into the maritime law and made it an equal and coordinate part of the maritime law governing the relation of a seaman to his ship and his employer.

It was the intention of congress that these two diverse and different systems of law should remain separate and distinct yet side by side as part of the maritime law with a right in the seaman to elect under which he would seek compensation for any injuries received in the course of his employment. This intention of congress is made clear by the history of the maritime law, by the nature of the relation existing between the seaman and his employer, and by the language used in the enactment of said Section 33. This Court, prior to the decision of the Supreme Court of the State of Washington, had so construed this statute. The respondent, prior to bringing this action

for the injury which he received in the course of his employment, had demanded and received from petitioner maintenance and cure for sixteen months and had demanded and received his wages to the end of the voyage on which he was injured. The respondent by so demanding his maintenance and cure and wages elected to take compensation for his injuries under the old rules. These facts were specially pleaded by petitioner in its answer and they constitute a complete bar to plaintiff's cause of action. The Supreme Court of the State of Washington in holding such facts constituted no defense to plaintiff's cause of action committed manifest error.

ARGUMENT

The one question, presented in this proceeding by the petitioner, is whether or not a seaman who has received a personal injury in the course of his employment, who has for said injury, demanded and received from his employer maintenance and cure, as far as medical and surgical skill can effect a cure, and who has demanded and received from his employer wages to the end of the voyage, can thereafter maintain an action against his employer and recover therein full common law damages for the same injury under Section 33 of the Merchant Marine Act.

I

Intention of Congress in Enacting Section 33 of the Merchant Marine Act.

The answer to this question requires a construction and an interpretation of Section 33 of the Merchant Marine Act, 41 Stat. 1007, now Section 688 Title 46 U. S. C. The material part of said section reads as follows:

> "That any seaman who shall suffer personal injury in the course of his employment may *at his election* maintain an action for damages at law, with the right of trial by jury, and in such

action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

The important question to be determined is what was the intention of the Congress of the United States in the enactment of this statute. A careful, thorough, and accurate historical review of the development of the law governing the relation of a seaman to his employer is to be found in the great case of

The Osceola, 189 U. S. 158.

It is sufficient for present purposes to call attention to the fact that the nature of the employment and relation existing between a seaman and his employer was vastly different from that existing between master and servant on land. The seaman could not quit his employment after the voyage had once begun. He was taken far from his home and among strangers. He was often required to expose himself to the greatest dangers and perils of the sea for the safety of the ship, its cargo, passengers, and other members of the crew. It was most natural therefore that the law governing the relation between a seaman and his ship and his employer should differ markedly from that governing the ordinary relation between master and servant, and the admiralty courts developed an entirely different set of rules governing this relation as compared with those developed by the common law courts.

The rules of law developed by the admiralty courts governing the relation of a seaman to his employer have always been considered more benign, just, and

humane than the rules developed by common law courts governing the relation of master and servant. The legislatures of the various states of the Union, in passing what is known as Workmen's Compensation Acts, have patterned them to a large extent upon the principles of law developed by the admiralty courts governing the relation of a seaman to his employer, in this, that they make definite and certain that the wounded servant will receive maintenance and medical attention and at least a certain portion of his wages during the time of disability.

It will not be presumed that congress intended when it enacted Section 33 of the Merchant Marine Act to take away from a seaman his absolute right to maintenance and cure when sick or wounded. The nature of a seaman's employment is such that it would be abhorrent to humanitarian principles to deprive him of this right and the court will certainly not construe this statute so as to deprive the seaman of this right unless forced to do so by the clearest and most positive terms of the statute. The plain language of the statute shows clearly that it was not the intention of congress to change or modify or abolish those great humanitarian rules developed by the admiralty courts.

Congress enacted that the injured seaman "may *at his election* maintain an action for damages." The principle of law is too well settled to require the citation of authorities that in construing a statute all the words used therein by the legislature must be given their common ordinary meaning, force and effect, if possible to do so. What did congress mean when it used the words "at his election" found in the statute?

The words "at his election" are in frequent use and their meaning has been defined by the courts so frequently that there can now be no dispute as to their correct interpretation. It certainly must be presumed that congress knew the meaning of those words when it passed the statute and intended to give them their well defined effect. Generally speaking, the words in substance and effect mean that a person who has a right of election must select one out of several. He cannot have both, or part of one and part of the other.

> "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone."
>
> *Wm. W. Bierce v. Hutchins*, 205 U. S. 340, 346;
>
> 3 Words and Phrases, pp. 2336-2337;
>
> 2 Words and Phrases (2d. Ser.) p. 233.

If congress in the enactment of Section 33 of the Merchant Marine Act in using the words "at his election" intended to give a seaman a right to elect between the relief granted by this act and some other relief, it must be some other relief which was existing at the time the statute was enacted, and the only relief which the injured seaman had at the time the statute was enacted was the relief accorded by the old rules of the admiralty courts and laid down in the case of *The Osceola*, *supra*, p. 175, as follows:

> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his mainten-

ance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211.

3. That all members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

It is manifest that congress in the enactment of Section 33 did not intend to abolish the old rules, for if the old rules were abolished there would be nothing left between which the injured seaman might elect. No language can be found in the statute showing an intention on the part of congress to change or modify the old rules. Nor is there anything strange or strained in this interpretation of the act. There are many instances in the law where wronged persons have a right to elect not only between remedies, but between substantive laws as a means of redress, as was pointed

out by this Court in the case of *Panama Railway Company v. Johnson*, 264 U. S. 375.

At the time this statute was enacted there were many instances where under the laws of this country an injured servant was given a right of election between two diverse substantive laws to measure his redress. For example, many of the Workingmen's Compensation Acts adopted by the various states of the Union are the same as the Iowa law, which this Court determined in *Chicago R. I. & P. Ry. v. Schendel*, 270 U. S. 611-613, was elective in form.

The history of the maritime law, the surrounding circumstances, the nature of the employment, and the language of the statute all point to the fact that it was not the intention of congress in the enactment of this law to abolish, change or modify the old rules, but on the contrary to allow the old rules to stand unchanged and merely to bring into the maritime law, new rules and give a seaman a right to elect under which of the two he chose to measure his compensation for an injury received.

II

Decisions of the Supreme and Inferior Federal Courts Construing the Statute.

The decision of the Supreme Court of the State of Washington in this case is not only out of harmony with the plain language of the statute, but is also contrary to the construction placed upon the statute by

this Court and the inferior Federal courts. This Court has had several occasions to construe this statute.

The constitutionality of this statute was involved in the case of

Panama Railway Company v. Johnson, 264 U. S. 375.

Among the various constitutional questions raised in that case is the following:

> "The Act is in conflict with the Fifth Amendment. The arbitrary and irrational discrimination carried by this law is apparent upon its face. If a privilege is to be given the plaintiff to try his cause of action under either one of two diverse systems of law, where not only the remedies but the rights are different, no sound reasoning can be advanced why a similar privilege should not be extended to the defendant." (p. 380)

In answering this contention of the employer this Court said:

> "A further objection urged against the statute is that it conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbitrary. The complaint is not directed against either measure of redress or either form of action, but only against the right of election as given. Of course the objection must fail. There are many instances in the

law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and if, accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought." (p. 392)

This Court held this statute constitutional against the above objection, not because there was no election between two diverse systems of law, but in spite of that fact, and this more clearly appears when other language used by this Court in the same case in answering other constitutional objections to the act is considered. The language is as follows:

"Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system *and extends to injured seamen a right to invoke at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified*, and not between the law and some non-maritime system. * * * So we think the reference is to all actions brought to

recover compensatory damages under the new rules as distinguished from the allowance covered by the old rules, usually consisting of wages and the expense of maintenance and cure." (p. 388)

In the case of *Engel v. Davenport*, 271 U. S. 33, the plaintiff, a seaman, brought an action for personal injuries received in the course of his employment with the defendant. The sole question before this Court was whether or not by his action he had elected to seek compensation for his injuries under the old rules or under the new. This Court in deciding that question said on page 35:

"It is settled by the decision in *Panama Railroad v. Johnson*, 264 U. S. 375, that §33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country wide, and uniform in operation; that it brings into the maritime law new rules drawn from Employer's Liability Act, and its amendments—adopted by the generic references to "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees"—and "extends to injured seaman a right to invoke at their election, either the relief accorded by the old rules or that provided by the new rules"; that is, that it grants them, as an alternative, the common law remedy of an action "to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules" which, as a modi-

fication of the maritime law, may be enforced through appropriate proceedings *in personam* on the common-law side of the courts.

1. The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnify for injuries caused by a defective appliance without regard to negligence for which an action at law could have been maintained prior to the Merchant Marine Act, *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See *Western Fuel Co. v. Garcia*, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, *we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules* in an action at law based upon negligence—in which he not only assumes the burden of proving negligence but also, under §3 of the Employer's Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. This conclusion is in harmony with the *Panama Railroad* case, pp. 382, 383, in which the complaint charged that the injuries resulted from negligence in providing a defective appliance and in other respects."

In *Baltimore S. S. Co. v. Phillips*, 47 Sup. Ct. Rep. 600, this Court held that it was error to allow any seaman maintenance and cure in an action brought to recover damages for personal injuries under Section 33 of the Merchant Marine Act. This Court held that in an action brought under the Merchant Marine Act the rules announced in *The Osceola* case were not operative and thereby again reaffirmed the principles which it had theretofore announced that the right of an injured seaman to recover under the old rules or the new were separate and distinct rights and could not be commingled and that his full right of recovery would be measured by either the one or the other, depending upon which he elected.

The inferior Federal Courts have always, as far as petitioner has been able to ascertain, uniformly held that congress by the enactment of Section 33 of the Merchant Marine Act did not change, modify or repeal in any way the old rules; that congress merely brought into maritime law new rules and an injured seaman might elect and must elect under which he will seek compensation for his injuries; that he could not have compensation under both or part of one and part of the other; and that a seaman's right under the old rules and the new were separate and distinct and could not be commingled.

Kuhlman v. W. A. Fletcher Co., 20 Fed. (2d) 465;
Lorang v. Alaska S. S. Co., 298 Fed. 547;
Wagstaff v. United States, 281 Fed. 877;
Hughes v. Alaska S. S. Co., 287 Fed. 427;
Phillips v. Baltimore S. S. Co., 295 Fed. 323;
Rosinski v. Conners, 21 Fed. (2d) 591;

In the case of *Kuhlman v. W. A. Fletcher Co., supra*, plaintiff brought an action on the common law side of the Federal District Court, based upon negligence; he afterwards sought by motion and amendment to the complaint to transfer his action to the admiralty side of the court and to recover for the same injuries under the old rules. The trial court refused to allow the amendment to the complaint and refused to transfer the case from the common law side of the court to the admiralty side. After judgment, the plaintiff appealed to the Circuit Court of Appeals for the Third Circuit and alleged error on the part of the trial court in its said ruling. The circuit court of appeals, in deciding this question was required to interpret Section 33 of the Merchant Marine Act, and in construing this section said (p. 467):

> "This section broadened the maritime law by giving a seaman a new right—a right at law—through proceedings *in personam*, according to the course of the common law, on the common-law side of Federal district courts. State courts also have like jurisdiction. *Engel v. Davenport*, 271 U. S. 33; 46 S. Ct. 410; 70 L. Ed. 813. By so doing the Congress did not abrogage his old action in Admiralty, but gave him an entirely new action and allowed him a clear option to assert his old action in Admiralty on the Admiralty side of the District court with trial to the court or to assert his new action, based on

negligence, on the law side with right of trial by jury. *Panama R. R. v. Johnson*, 264 U. S. 375; 44 S. Ct. 391; 68 L. Ed. 748; *Engel v. Davenport*, 271 U. S. 33, 36, 46 S. Ct., 410; 70 L. Ed., 813. If he elect the latter, he foregoes the advantages which the Government extends to seamen as its wards and places himself in the same relation to his employer as a railway employee engaged in interstate commerce bears to his employer, with different yet certain advantages and certain disadvantages. *Engel v. Davenport*, 271 U. S. 33, 36, 46 S. Ct., 410; 70 L. Ed., 813. These old and new rights may not be commingled but must be asserted separately in the forum which has jurisdiction of them respectively. *The West Jester* (D. C.), 281 F. 877, 878."

The petitioner respectively submits that this court and the inferior Federal courts in the above cited cases have firmly established the following propositions of law:

1. That the maritime law at the time of the injury to respondent afforded to an injured seaman two separate and distinct grounds of relief or causes of action, one to recover the allowances provided by the old rules, the other to recover the damages provided by the new.

2. That he may pursue either at his election.

3. That he must elect under which he will seek compensation.

4. That he cannot recover under both the old and new, or a part of one and a part of the other.

III.

Did the Respondent Elect to Take Under the Old Rules Prior to Bringing the Present Action Under the New Rules?

Petitioner in its answer (R. 3) and amended answer (R. 9) to the respondent's complaint by way of affirmative allegations and affirmative defenses alleged that the respondent immediately after the injury was given such treatment and care as the ship was able to provide and that upon the ship's arrival at the Port of San Francisco the respondent, with his consent, was immediately taken by the petitioner to the Marine Hospital for maintenance and cure. That he was maintained at the Marine Hospital by the petitioner for a period of about sixteen months and he left the Marine Hospital voluntarily and was cured at the time he left as far as medical and surgical skill could reasonably effect a cure. That while at said hospital the petitioner, at respondent's request and demand, paid him his wages to the end of the voyage which consisted of about two weeks' wages amounting in all to the sum of $41.10. The respondent was receiving wages at the time in the sum of $80.00 per month and he was injured about two days after the voyage started. Respondent at the time of the injury was a boatswain (R. 2 Par. 3). It was further alleged by the petitioner that the ship on which the respondent was injured was at the time of the injury properly equipped, manned, victualled and in all respects seaworthy (R. 12 Par. 3). That respondent at his request received from the

petitioner such maintenance and cure and wages prior to the commencement of the present action and by so doing he voluntarily elected to take compensation for his injuries under the general admiralty and maritime law and he had been fully and completely compensated by the respondent for said injuries under said general admiralty and maritime law, that he made said election for said compensation and received the same under the general admiralty and maritime law prior to the filing of this suit.

None of these allegations are denied and all of them must be accepted as true. The Supreme Court of the State of Washington found these allegations to be true as a matter of fact. The Supreme Court found:

> "At the time of the injury respondent was thirty-six years of age and had followed the sea 21 years prior to the injury." (R. 37)
>
> "Under all the decisions he was entitled to wages and maintenance at least to the end of the voyage and cure if possible. That was accorded him by paying him the small amount of wages due to the end of the voyage and taking him for care and treatment to the United States Marine Hospital. He did not reject the treatment and care at the hospital, but accepted it so long as it seemed necessary and proper." (R. 41)

Under these allegations and facts it clearly appears that the respondent prior to the bringing of the present action not only demanded but received from the petitioner all of the compensation to which he was entitled under the old rules, and it has not

been denied so far and cannot be successfully denied, that under such facts, respondent elected to take compensation under the old rules if under the law he is required to elect or can elect under which set of rules he would receive compensation for his injuries.

This court in the case of *Robb v. Vos*, 155 U. S. 13-43, held:

> "The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."
>
> *Wall v. Parrott Silver & Copper Co.*, 244 U. S. 407;
>
> *Engel v. Davenport*, 271 U. S. 33;
>
> *Kuhlman v. W. A. Fletcher Co.*, 20 Fed. (2d) 465.

The substance of the holding in these cases is that any decisive act by a party who has an election, constitutes such election and particularly the bringing of an action. The acts of the respondent in this case, as alleged by the petitioner and found to be true by the Supreme Court of the State of Washington, in substance not only amount to the bringing of an action under the old rules but the prosecution of such an action to final judgment and also the receipt of payment and the satisfaction of such judgment. He certainly cannot now be heard to say that he did not elect to receive compensation under the old rules. A complete settlement and satisfaction out of court

is as much a bar to a subsequent action on the same controversy as is a prior judgment.

12 Corpus Juris 336.

The petitioner in maintaining the respondent and providing him with maintenance and cure at the Marine Hospital at San Francisco, performed its full duty to respondent to the same extent as though it had provided him with maintenance and cure at a private hospital.

The Santa Barbara, 263 Fed. 369;
The Bouker, No. 2, 241 Fed. 831;
The Balsa, 10 Fed. (2d) 408.

The penalty attached to a ship and its owner for neglecting or refusing to provide a wounded seaman with maintenance and cure, or for failure to pay wages when demanded, if due, is so great and severe (*The Iroquois*, 194 U. S. 240; Section 596, Title 46 U. S. C.) that fair dealing and simple justice requires that a court should not hesitate to hold that a seaman who has received or demanded maintenance and cure for an injury or wages to the end of the voyage has elected to take compensation under the rules providing for such maintenance and cure and wages after injury.

IV.

The Decision of the Supreme Court of the State of Washington.

The history of the maritime law, the plain language of the statute, the construction placed upon this

statute by this court and the inferior Federal courts, seems to the petitioner to so firmly and conclusively establish and uphold the position taken in this case that it does not seem necessary or advisable to discuss in detail the decision of the Supreme Court of the State of Washington. That court summed up its decision in the following language (R. 46):

> "Surely the injured seaman should not be held to have elected his remedy by accepting so positive a matter-of-course duty on the part of the shipowner toward him as wages, maintenance and cure, which he is entitled to receive under any and all circumstances except for misconduct. It does not appear that the amendment of 1920 was intended to restrict in any way the seaman's rights as they previously existed, and, as has been shown, it was well settled before the adoption of the amendment by congress that the seaman was not required to elect between a claim for indemnity and a claim for maintenance and cure, but might in one action demand and recover both."

It appears clear from this quotation that the State Court held that Congress by enacting Section 33 of the Merchant Marine Act did not abolish, change, modify or alter the old rules, but that they are still in full force and effect. That a seaman is now entitled to all of the compensation provided by the old rules and that it is also the absolute duty of the shipowner to provide seamen the compensation provided by the old rules. That by accepting all of the

compensation provided by the old rules the seaman does not elect to take compensation under the old and is not estopped from recovering full common law damages under the new. The old rules were designed to and did furnish full and complete compensation for an injury. The new rules are designed to and do furnish full and complete compensation for an injury. It therefore necessarily follows that if a seaman can recover under both, the shipowner is compelled to pay double compensation to an injured seaman.

Such construction placed upon the statute renders it most unusual. We know of no instance under either the American or English system of law where an injured party has been allowed to recover double compensation for the same injury, and such an intention can hardly be attributed to the Congress of the United States in enacting this statute.

If a statute requiring a defendant to pay in addition to damages sustained the sum of $10.00 for attorney's fees renders the statute unconstitutional, as was decided by this court in the case of

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150,

it hardly seems necessary to contend that the construction placed upon this statute by the Supreme Court of the State of Washington, which requires a ship owner to pay full and complete compensation under both the old rules and the new, would render this statute unconstitutional. Such a construction is to be avoided.

> "But as this Court often has held 'a statute must be construed if fairly possible so as to avoid

not only the question of its unconstitutionality, but also doubts on that score.' "

Panama Railway Co. v. Johnson, supra, p. 390.

The Supreme Court of the State of Washington seems to have arrived at its most remarkable construction of this statute upon the theory that under the old rules a seaman was allowed to bring successive actions until he had recovered all of the compensation allowed by said rules. It seems to be established by the inferior Federal courts that an injured seaman may seek all of the compensation due him under the old rules in one suit or in several.

So far as petitioner is informed this Court has never passed upon the question of whether or not a seaman may bring more than one action under the old rules to recover his full compensation for an injury received. Such a rule however clearly violates the general and well established principle of law against the splitting of a cause of action and does not seem to be in harmony with the recent decision of this Court in the case of *Baltimore S. S. Co. v. Phillips*, 47 Sup. Ct. Rep. 600.

Granting however that a seaman may bring successive suits to recover full compensation provided by the old rules, that fact does not even to the slighest extent support the proposition that a seaman may, after demanding and receiving full compensation under the old rules, or after having elected to take compensation under the old rules, again demand and receive full compensation for the same injury under the new, or maintain suit to recover full compensation

under the new rules. If he may or must elect under which rules he will receive his compensation, then when he has once made his election, under all the authorities, he is bound thereby and must seek his compensation under the rules which he selects and his full compensation must be measured by the selected rules alone, otherwise there is no election. The only effect that the rule that a seaman may bring successive actions under the old rules could possibly have in this case is that if wages, maintenance and cure is not all of the relief which respondent is entitled in fact to receive, he may pursue the petitioner further and still recover any additional relief to which he is entitled under the old rules.

The decision of the Supreme Court of the State of Washington, in effect, strikes from the statute the words "at his election" found therein and substitutes in place thereof the following words: "After having received full compensation for such injury under the general maritime law as it now exists."

With all due deference and respect to the Supreme Court of the State of Washington, its decision in this case seems to the petitioner to evince an over eager desire to legislate rather than to interpret legislation, and also an unseemly reluctance to tread the path well defined by this court.

V

The Contention of Respondent.

Respondent has at all times contended that the words "at his election" found in the statute mean an

election to prosecute the rights given by the new rules in an action at law or by libel in admiralty. This contention of the respondent cannot be sustained.

In the first place it is based upon the assumption that the enactment of Section 33 of the Merchant Marine Act, abolished the old rules. As we have heretofore seen, this cannot be true, and in addition to what has heretofore been said, a hasty review of the reports discloses the fact that seaman since the passage of Section 33 of the Merchant Marine Act have been, and now are, relying upon the old rules as a means of redress much more frequently than they have upon the new.

The case of the "*Quinnipiac*," *William Nahmen v. U. S.*, 1926 A. M. C. 1150, is one of the many illustrative cases that might be cited and no court has held, so far as petitioner has been able to discover, that the old rules are no longer in force and effect.

In the second place this contention of the defendant ignores one of the cardinal principles of statutory construction in that it fails to give any force or effect to the words "at his election" found in the statute, for the reason that prior to the adoption of the statute, an injured seaman had the right to elect between a common law action and a libel in admiralty under Sections 24, Paragraph 3, and 256, Paragraph 3 of the Judicial Code, and would have had that right had the words "at his election" been omitted from the statute.

Panama Railway Co. v. Johnson, supra.

In the third place, such a contention wholly ignores the plain language of this Court in the cases above cited, to the effect that the words "at his election" in

the statute mean an election between the old rules and the new.

CONCLUSION

The petitioner submits that its plea of election and payment under the old rules is a good and valid plea and a bar to the prosecution of any action for the same injury under the new rules and that since the Supreme Court of the State of Washington has found the facts set out in petitioner's said plea are true, the judgment in this case must be reversed and should be sent back with instructions to the lower court to dismiss this action.

Respectfully submitted,

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In the Supreme Court of the United States

NO. 49

OCTOBER TERM, 1928

PACIFIC STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

CARL G. PETERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of the Respondent

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In the Supreme Court
OF THE
United States

NO. 49
OCTOBER TERM, 1928

PACIFIC STEAMSHIP COMPANY,
Petitioner,

vs.

CARL G. PETERSON,
Respondent.

Brief of the Respondent

OPINION

The opinion of the Supreme Court of the State of Washington (R. 34) is reported in 145 Wash. 460.

THE QUESTION PRESENTED

This case involves a construction of the Act of June 5, 1920, Sec. 33, Chap. 250; 41 Stat. at L. 988, U. S. Code, Title 46, Sec. 688, which is as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Supreme Court of the State of Washington held that the voluntary payment by the petitioner of the wages to the end of the voyage, amounting to $41.10, and furnishing of free medical, surgical and hospital service by the United States Public Health Service was not a bar to the maintenance of this action for compensatory damages. The petitioner urges and the sole question presented is: Does the payment of wages to the end of the voyage and the furnishing of free medical, surgical and hospital service by the United States Public Health Service bar an action for compensatory damages under the Merchant Marine Act?

STATEMENT OF THE CASE

No portion of the evidence is brought here and the question is attempted to be raised solely by the pleadings.

The respondent was injured at sea while serving as boatswain upon petitioner's Steamship Admiral Dewey. He was treated in the Marine Hospital at San Francisco by the United States Public Health Service and while confined in the hospital was paid his wages due under the Articles to the end of the voyage, amounting to $41.10. (R. 9-13.)

Thereafter he recovered a judgment for $12,500.00 in the Superior Court of the State of Washington for King County, which was affirmed by the Supreme Court of the State of Washington and the case brought here by Writ of Certiorari.

SUMMARY OF ARGUMENT

If the words in question "at his election" have any other meaning than that ascribed to them by the Supreme Court of the State of Washington in its opinion, that is, a choice between a suit in admiralty and a trial by the Court, or a trial by jury according to the course of the common law if an action is instituted in a law court, then the words refer to a choice between the inconsistent actions for compensatory

damages on the ground of unseaworthiness in rem or in personam and for compensatory damages on the ground of negligence, and not between an action for damages on any ground and the consistent and cumulative remedy of wages, maintenance and cure, which is entirely a separate and distinct cause of action.

1. The origin of the act shows that the mischief or evil to be cured was the inability of a seaman to recover compensatory damages for personal injuries except when caused by unseaworthiness.

2. The right to wages, maintenance and cure is a cause of action separate and distinct from a cause of action for compensatory damages and has always been cumulative and co-extensive and not inconsistent with an action for compensatory damages.

3. The construction urged by petitioner is so absurd in its consequences as to call for the application of the rule that the Court will adopt in cases where more than one view is open, the reasonable construction of the act rather than the unreasonable one.

4. The rule of election of remedies only applies to inconsistent ones and not to those entirely consistent and cumulative.

5. That the question presented was not decided in any of the authorities cited by the petitioner.

ARGUMENT

ORIGIN OF THE ACT.

In 1902 the Supreme Court of the United States in *The Osceola*, 189 U. S. 158 enumerated the rules applicable in cases of injury to seamen in four distinct propositions, significant amongst which was that a seaman could not recover compensatory damages for personal injuries unless caused by unseaworthiness of the ship.

Congress attempted, by Section 20 of the original Merchant Marine Act of 1915, to extend to seamen greater rights in cases of personal injury, by the following provision:

> "That in any suit to recover damages for any injuries sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

In 1918 in *Chelentis vs. Luckenbach Steamship Co.*, 247 U. S. 372, it was held that the Act did not substitute the common law measure of liability in such cases.

Subsequently, on June 5, 1920, Congress by Section 33 of the Merchant Marine Act extended to seamen, in cases of personal injury of death, the Federal Employers' Liability Act relating to railroads.

GENERAL CONSIDERATIONS

There are three possible constructions of the words "at his election."

First. That urged by the petitioner—that the the statute refers to a choice between wages, maintenace and cure and compensatory damages.

Second. The one adopted by the Supreme Court of the State of Washington—that the Act referred to a choice of remedies, that is, a trial by the Court in admiralty or a trial by jury according to the course of the common law.

Third. That the election referred to by the plain terms of the statute is an election between an action for damages on the ground of unseaworthiness, and an action for damages on the ground of negligence, and not an election between the contract action of wages, maintenance and cure and an action for damages in tort.

If the contention urged by the petitioner is sustained the right of seamen would be seriously abridged in many particulars.

The United States has established the United States Public Health Service, which maintains marine hospitals in many ports. That service provides, without cost to either the ship, its owners or the seamen,

hospital, medical and surgical attention in cases of sickness or injury to the seaman. It has been decided that if a seaman, in case of sickness or injury, rejects the service of the marine hospital he is deprived of his right to recover his hospital and medical expenses.

The Santa Barbara, 263 Fed. 369;
The Bowker, 241 Fed. 831;
The Balsa, 10 Fed. 2nd. 408;
Morris vs. United States, 3 Fed. 2nd. 589.

If the petitioner's contention is sustained a seaman would be deprived of his right to compensatory damages in case he accepted the free service of the marine hospital. If he rejected the surgical and hospital facilities so afforded, he is precluded from recovering the cost of private physcians and surgeons and private hospital expenses.

In cases then of serious injury the use of the United States Public Health Service and the facilities available would be seriously impaired, if not, in fact, totally destroyed, because a seaman would forfeit whatever right he might have to damages in case he accepted the free medical, surgical and hospital facilities so afforded.

If, perchance, the injuries were caused by the unseaworthiness of the ship the seaman might recover

damages after accepting the marine hospital service, but if the same injuries were caused aboard the same ship by the negligence of the ship's crew or the owners, he could not recover compensatory damages.

If a seaman were injured at the beginning of a long voyage and allowed the ship's doctor to treat his injury, or if he accepted the maintenance of the ship on the voyage, he would have made his election, barring his right to recover damages, in case the petitioner's view is correct. Does it not follow that if a seaman, under such circumstances, desires to preserve his right of action for the injury that it is necessary for him to immediately leave the ship? The results which must necessarily follow are so absurd and unreasonable that the construction urged by the petitioner should not be attributed to Congress unless there is no reasonable construction to be placed upon the terms employed.

CONSTRUCTION OF THE STATUTE

That this act is to be liberally construed is manifested by all of the decisions of this Court construing the act, the most illustrative of which is the recent and widely discussed case of *International Stevedoring Co. vs. Haverty*, 272 U. S. 50.

It is one of the cardinal rules of statutory construction that where two constructions of a statute

are open, one of which is absurd and will produce inequality and injustice and the other reasonable, the Court will adopt the reasonable one.

This was expressed by the Court in *Oates vs. National Bank*, 100 U. S. 239, 244 in the following words:

> "The duty of the Court, being satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction, (*Wilkinson vs. Leland*, 2 Pet. 627, *Sedgwick Const. and Stat. Constr.* 196) and we should discard any construction that would lead to absurd consequenses. *United States vs. Kirby*, 7 Wal. 482. We ought, rather, adopting the language of Lord Hale, to be 'curious and subtle to invent reasons and means' to carry out the clear intent of the law-making power when thus expresed.

And the Court in *Knowlton vs. Moore*, 178 U. S. 41, on page 77 of the opinion said:

> "We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co., vs. Sulzberger*, 157 U. S. 1, 37, *Wilson vs. Rousau*, 4 How. 646, 680, *Bloomer vs. McQuewan*, 14 How. 539, 553, *Blake vs. National Banks*, 23 Wal. 307, 320; *United States* vs. *Kirby*, 7 Wal. 482, 486."

The Court in *Fleischman Co. vs. United States*, 270 U. S. 349, on page 360, said:

> "The strict letter of an Act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress, *Church of the Holy Trinity, vs. United States*, 143 U. S. 457, 459; *Ozawa vs. United States*, 260 U. S. 178, 194, and unjust or absurd consequences are, if possible, to be avoided. *Lau Ow Bew vs. United States*, 144 U. S. 47, 59; *Hawaii vs. Mankichi*, 190 U. S. 197, 213."

It has uniformly been recognized by Courts construing statutes upon which different constructions are placed to have regard for the evil or mischief which brought forth the statute.

In *Smith vs. Townsend*, 148 U. S. 490, 494, the Court expressed this rule in the following language:

> "It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus in *Heydon's Case*, 3 Rep. 7b, it is stated that it was resolved by the Barons of the Exchequer as follows:
>
> 'For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:
>
> First: What was the Common Law before the making of the Act.

Second: What was the mischief and defect for which the Common Law did not provide.

Third: What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.

Fourth: The true reason of the remedy.'

And by this court in *United States vs. United Pacific Railroad,* 91 U. S. 72, 79, it was said that 'Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it. *Aldridge vs. Williams,* 3 How. 24, *Preston vs. Browder,* 1 Wheaton, 120' and in *Platt vs. United Pacific Railroad* 99 U. S. 48, 64, 'that in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances'."

To adopt then the contention of the petitioner with the consequent absurd and unjust consequences would be wrong in light of the evident evil which brought forth the statute—that is, the impossibility of a seaman to recover damages for the effects of his injury when the liberal and reasonable view can be adopted that his contractual rights to wages and a free cure in the marine hospital is not an election barring his ex delicto action for damages for the effects of his injury.

WAGES. MAINTENANCE AND CURE

CONTRACTUAL

By decisions of unquestioned soundness and of long standing it has been determined that the right of seamen to recover wages, maintenance and cure is contractual in its nature and exists under any and all circumstances except when the injuries are occasioned by the seaman's own wilful misconduct.

The Osceola, 189 U. S. 158;

Cresci vs. Standard Fisheries, 7 Fed. 2nd. 378, 1925, A. M. C. 1026;

John A. Roebling & Sons vs. Erickson, 261 Fed. 986;

The Rolph, 299 Fed. 52, 1924, A. M. C. 942;

The A. Heaton, 43 Fed. 592;

Flyn vs. The Panama Railway, 201 N. Y. S. 56;

The Troy, 121 Fed. 901;

The West Jester, 281 Fed. 877;

Olson vs. Whitney, 109 Fed. 80;

The Hanna Nielson, 273 Fed. 171;

It was well expressed by District Judge Kerrigan in *Cresci vs. Standard Fisheries*, 7 Fed 2nd. 378:

> "On the other hand, it is quite clear than an action for miantenance and cure is contractual in its nature. As is said in 35 Cyc., at p. 1200: 'Under the maritime law, it is the duty of the vessel to care for a seaman taken sick on the voyage and to bear the expense of his medical

treatment, * * even though the cause of his injury can be attributed to no one'."

And in the *Montezuma*, 19 Fed. 2nd, 355, the right was aptly defined:

> 'The relation of a seaman to his vessel creates a personal indenture, establishing rights for maintenance and cure in case of personal injury. It results in much liberality of remedy in order that he may not be defeated of such humanitarian purposes."

In *The A. Heaton*, 43 Fed. 592 the Court said:

> "A seaman, taken sick, or injured, or disabled in the service of the ship, has the right to receive his wages to the end of the voyage, and to be cured at the ship's expense. That right, indeed, grounded solely upon the benefit which the ship derives from his service, and having no regard to the question whether his injury has been caused by the fault of others or by mere accident, does not extend to compensation or allowance for the effects of the injury; but is in the nature of an additional privilege and not a substitute for, or a restriction of other rights and remedies. It does not, therefore, displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts."

It was decided in *The Osceola*, 189 U. S. 158, that the seaman was entitled to compensatory damages only when his injury was caused by the unseaworthiness of the ship, in which case he could recover full compensatory damages, or as it has been sometimes designated an indemnity.

These rights were absolutely independent and existed simultaneously and concurrently. The two were completely separate and distinct. This is well illustrated by the Court in *John A. Roebling & Sons vs. Erickson*, 261 Fed. 986:

> "The plaintiff should not have been required to elect whether to stand on his claim for indemnity, or upon his right to wages and expense of cure and maintenance to the end of the voyage. To the latter the seaman is entitled under any and all circumstances, except his own willful misconduct.'

And in the case of *Rolph*, 299 Fed. 52:

> "Nor should Kohilas be precluded from recovering because of the fact that in another proceeding for wages and maintenance he recovered. His right to wages, maintenance and expense of cure existed under any and all circumstances unless there was willful misconduct; but his right to recover an indemnity is a separate matter. The decree for wages cannot be imposed against his demand for damages. *The A. Heaton*, 43 Fed. 592."

ELECTION OF REMEDIES

Section 33 of the Merchant Marine Act gives a right of action ex delicto. The action given was in lieu of and in addition to the right of the seaman under the old rules to recover an indemnity where he was entitled to it. The election afforded then is, by both reason and authority, a choice between an action

based upon unseaworthiness under the old rules and an action for compensatory damages based upon negligence under the terms and provisions of the statute.

The words of the statute:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury and in such action, etc."

refer to actions for damages for the injury and not between an action for damages and for his contractural rights to wages, maintenance and cure.

It is established by the following cases:

Cresci vs. Standard Fisheries, 7 Fed. 2nd. 378, 1925 A. M. C. 1026;

John A. Roebling & Sons vs. Erickson. 261 Fed. 986.

The Rolph, 299 Fed. 52, 1924, A. M. C, 942;

The A. Heaton, 43 Fed. 592;

Flyn vs. The Panama Railway, 201 N. Y. S. 56;

The Troy, 121 Fed. 901;

The West Jester, 281 Fed. 877;

Olson vs. Whitney, 109 Fed. 80;

The Hanna Nielson, 273 Fed. 171.

that the action for wages, maintenance and cure is contractual in its nature and not in any wise intended as compensation for the injuries sustained.

The two actions are not in any wise inconsistent, but the recovery of damages on the ground of unseaworthness would be inconsistent and a bar to a subsequent action for damages based upon negligence. As the Court determined in *Phillips vs. The Baltimore Steamship Co.*, 274 U. S. 316, the cause of action, whether based upon unseaworthiness or negligence, is one and the same.

In applying the rule of election of remedies the courts have announced that the remedies must be inconsistent. On the other hand if the remedies are consistent a pursuit of one, or a recovery of one, will not bar a recovery of the other. The remedial rights adopted must be irreconcilable.

Zimmerman vs. Harding, 227 U. S. 489.
Bierce vs. Hutchins, 205 U. S. 340.
Brady vs. Daley, 175 U. S. 148.

The right of the seaman to wages, maintenance and cure and compensatory damages under the Jones Act were in *The Talayha*, 26 Fed. 2nd, 601, held by the Circuit Court of Appeals for the Ninth Circuit not to be inconsistent. The Court said:

> "There is no inconsistency between the right to recover for maintenance and cure under the general admiralty law and the additional right conferred by the 1920 amendment. The remedies are not of such a nature that the adoption of the

one is a repudiation or negation of the other. The appellee simply had two co-existing remedies, with the right and privilege of choosing either mode of redress, and when he made his choice his act in so doing cannot be construed as a final repudiation of every other right. In other words, the remedies are not inconsistent, in the sense that the adoption of the one precludes a resort to the other."

It is, furthermore, fundamental that the election must refer to remedies for the same cause of action. Applying those rules to the instant case we find that the right to wages, maintenance and cure is in no wise intended as compensation for the effects of the injury received; that it is a separate and distinct cause of action, contractural in its nature, arising out of the personal indenture created by the shipping Articles between the seaman and the ship, and is based entirely upon the benefit which the ship receives from his services.

The opinion of the Court in *Plamals vs. Pinar Del Rio*, 72 L. Ed. 540, illustrates the distinction between the actions under the old rules and those created by the statute. If the action is for compensatory damages for unseaworthiness then a lien exists against the ship which may be enforced by a libel in rem. But, on the other hand, no lien is created by Section 33 of the Merchant Marine Act and consequently the rights created may be enforced only by appropriate

proceedings in personam, either in admiralty or in a common law Court.

It would be unfair and unjust to allow a seaman, in case of injury, to recover compensatory damages either in personam or in rem on the ground of unseaworthiness and thereafter to recover compensatory damages on the ground of negligence.

It was to this that Congress referred by the words "at his election" because, as has previously been observed, prior to the passage of the act the right to damages for the effects of the injury and the right to wages, maintenance and cure were separate, distinct, cumulative and consistent.

The express purpose of the Act being to provide for the protection and maintenance of the American Merchant Marine the words employed do not convey an intention on the part of Congress to restrict seamen's rights, but the evident spirit and purpose of the Act were to afford seamen the same measure of relief afforded railway employees in case of personal injury.

It was aptly expressed by the Supreme Court in New York in *Flynn vs. Panama Railroad*, 201 N. Y. Sup. 56:

> "It does not appear that the Act of Congress of June 5, 1920, was intended to restrict in any

way seamen's rights as they previously existed, and it was settled law before the adoption of the Act of Congress, supra, that the seaman was not required to elect between a claim for indemnity and a claim for maintenance and cure, but might in one action demand both."

DECISION OF THE SUPREME COURT

The conclusion and the result of the decision of the Supreme Court of the State of Washington herein are correct, the Court being of the opinion, and so holding, that the seaman had not elected his remedy by accepting so positive a matter of course duty on the part of the ship owner toward him as wages, maintenance and cure. If the reasoning by which the Court arrived at that conclusion is faulty it is "an unavoidable incident in the search by Courts of last resort for the true rule."

Under such circumstances this Court announced in *Carlisle Packing Co., vs. Sandanger,* 259 U. S. 255, the rule to be as follows:

> "Here the trial court did not instruct the jury in consonance with these rules and by failing to do so fell into error.
>
> But mere error without more is not enough to upset the judgment if the record discloses that no injury would have resulted therefrom."

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AUTHORITIES RELIED UPON BY THE PETITIONER

The cases in this Court under the Jones Act touching this question in any wise are:

Plamals vs. The Pinar Del Rio, 72 L. Ed. 540.

Baltimore Steamship Co. vs. Phillips, 274 U. S. 316.

Panama Railroad vs. Vasquez, 271 U. S. 557.

Engel vs. Davenport, 271 U. S. 33.

Panama Railroad vs. Johnson, 264 U. S. 375.

The petitioner seizes upon certain language of the Court employed in those cases in reaching the conclusions in the particular cases as conclusive of the question herein presented.

The question here has not been before the Court before, nor has it been decided. In reaching the conclusions in those cases language was used in expressing the reasoning of the Court which was not involved by the facts.

The Court has many times observed that the language used in an opinion is to be taken in connection with the facts under consideration. Mr. Chief Justice Marshall pronounced the rule in *Cohens vs. Virginia*, 6 Wheaton, 264, 399, in the following manner:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be tak-

> en in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Mr. Justice Brandeis in his dissenting opinion in *Washington vs. Dawson & Co.*, 264 U. S. 219, 236, aptly said:

> "It would require merely that we should limit the application of the rule therein announced, and that we should declare our disapproval of certain expressions used in the opinions. Such limitation of principles previously announced, and such express disapproval of dicta, are often necessary. It is an unavoidable incident of the search by Courts of last resort for the true rule. The process of inclusion and exclusion so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."

It was said in *Bramwell vs. United States Fidelity & Guaranty Co.*, 269 U. S. 483, 489:

> "It is a rule of universal application that general expressions used in a Court's opinion are to

be taken in connection with the case under consideration."

Weaver vs. Palmer Bros. Co., 270 U. S. 402.
Taylor vs. Voss, 271 U. S. 176.

CONCLUSION

We, therefore, respectfully submit that under the well established rules of construction this Act is to be liberally construed with the view to effect the object intended of allowing seamen to recover damages for personal injuries and not to restrict the rights of seamen. That the right of the seaman to wages, maintenance and cure is a cause of action sounding in contract, separate and distinct from one for damages and in no wise inconsistent with it. That under all of the authorities an election of remedies takes place only where they are inconsistent and irreconcilable. That the intent of Congress was to afford seamen a choice between an action for damages on the ground of unseaworthiness which might be enforced by appropriate proceedings in either rem or personam, and a personal action against the owners for damages, based upon negligence, and not to substitute or restrict the right of seamen, in cases of injury, to wages, maintenance and cure, where he accepted the service of the marine hospital.

We, therefore, respectfully submit that the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfuly submitted,

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and

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